The Attorney General of Texas

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Honorable Robert C. Flowers
Director, Criminal Justice Division
Office of the Governor
411 West 13th Street
Austin, Texas 78701

Open Records Decision No. 217

Re: Whether a preliminary work program for an audit is a trade secret under the Open Records Act.

Dear Mr. Flowers:

Pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act, you ask whether a preliminary work program for an audit is public under the Open Records Act. The audit program is part of a proposal submitted by Touche Ross & Co. to conduct an audit for the Criminal Justice Division of the Governor's Office. The entire proposal has been requested, but there is no objection to release of the remainder of the proposal. It is contended that the audit work program is excepted from required public disclosure by section 3(a)(10) of the Act which excepts

> trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

An audit program consists of the plan and procedure by which an auditor conducts his audit. An accounting firm will specially adapt a program as it approaches each audit, and programs often reflect a substantial investment of time and money. We are advised that superior audit programs can give accounting firms significant competitive advantages.

These programs are carefully treated as confidential within the firm and the industry. Only those employees who are involved with that particular audit are allowed access to the program. Manuals that contain audit plan information are assigned to specific employees and are required to be returned if an employee leaves the firm. During the audit, the audit program and auditor's workpapers are kept under lock when not in use. Also, in the proposal to the Criminal Justice Division, Touche Ross & Co. singled out the audit program as the only part of the proposal that it requested be kept confidential.

The Texas Supreme Court has defined a "trade secret" as

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). Besides giving advantages to competitors, a trade secret must also be treated as confidential by the business. Open Records Decision Nos. 198, 184 (1978); 175 (1977); 89 (1975). In Open Records Decision No. 175 this office decided that part of a proposal submitted by Electronic Data Systems qualified as a trade secret and was excepted by section 3(a)(10) from required public disclosure. We noted that Electronic Data Systems had consistently made extensive efforts to keep such information confidential and that courts had held that similar information constituted trade secrets. In Open Records Decision Nos. 198 and 184 we decided that information did not qualify for the 3(a)(10) exception when the businesses did not indicate what efforts, if any, had been made to keep the information confidential and there were no court decisions holding similar information to be trade secrets. In this instance, we believe that Touche Ross & Co. has demonstrated that they make significant efforts to protect the confidentiality of the audit programs. Furthermore, at least one court has held that audit programs are "trade secrets." Rosen v. Dick, 1974-75 CCH Fed. Sec. Law Reports, Par. 94,989 (S.D.N.Y. 1975). Cf. U.S. v. Coopers and Lybrand, 413 F. Supp. 942 (D. Colo. 1975) (audit program held not subject to Internal Revenue Service subpoena since no direct showing of relevancy). In our opinion this audit program is excepted from required public disclosure by section 3(a)(10) as a trade secret.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

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C. ROBERT HEATH, Chairman
Opinion Committee

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